Pioneer Recycling Corp. and Pioneer Carting Corp. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO. Cases 2–CA–27923 and 2–CA–28010

May 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 8, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Pioneer Recycling Corp. and Pioneer Carting Corp., New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(d) in place of paragraphs 1(c), 1(d), and 1(f) and reletter paragraphs 1(e) and 1(g) as paragraphs 1(c) and 1(e), respectively.

"(d) Threatening employees with bodily harm, locking them in a garbage truck and refusing to release them, and shooting them with a pellet gun in retaliation for testifying for the Union at arbitration proceedings or for filing unfair labor practices against the Respondents."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 813, International Brotherhood of Teamsters, AFL–CIO or any other union.

WE WILL NOT make promises of benefits to employees if they withdraw their grievance.

WE WILL NOT coercively interrogate employees about their union activities, and induce them to sign a letter repudiating charges filed in their behalf.

WE WILL NOT threaten employees with bodily harm, lock them in a garbage truck and refuse to release them, or shoot them with a pellet gun in retaliation for testifying for the Union at arbitration proceedings or for filing unfair labor practice charges against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Daniel Cherry full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Cherry whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Daniel Cherry, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

PIONEER RECYCLING CORP. AND PIONEER CARTING CORP.

Rhonda Gottlieb, Esq., for the General Counsel.
Gerald Dandeneau, Esq. (Dandeneau & Curto, LLP), of Melville, New York, for the Respondents.
Michael Lieber, Esq., of New York, New York, for the Charging Party.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that employee Daniel Cherry was constructively discharged, we reject as wholly frivolous the Respondents' contention in their brief that there were no substantial changes made in Cherry's working conditions. The judge found, and we affirm, that the Respondents unlawfully threatened Cherry with bodily harm, locked him in the rear of a garbage truck for 2 to 3 hours, and shot at and hit him three times with a pellet gun.

[3] We find merit in the General Counsel's exceptions to the judge's failure to find that Cherry's discharge also violated Sec. 8(a)(3) and (4) of the Act, particularly in light of the judge's express findings that the Respondents' actions against Cherry were in retaliation for his "testifying in behalf of the Union at the DiGeorgio grievance, and for his filing [of unfair labor practice] charge against them." We shall modify the Order accordingly.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge in Case 2–CA–27923 filed by Local 813, International Brotherhood of Teamsters, AFL–CIO (the Union) on October 28, 1994, and a charge and a first amended charge in Case 2–CA–28010 filed by the Union on December 2, and 22, 1994, respectively, a consolidated complaint was issued on August 31, 1995, against Pioneer Recycling Corp. and Pioneer Carting Corp. (Respondents).[1]

The complaint alleges essentially that Respondents unlawfully (a) made promises of benefit to employee Daniel Cherry if he refused to pursue and failed to testify in support of his grievance, (b) threatened Cherry with bodily harm if he pursued the grievance and because he testified in behalf of a coworker, (c) locked Cherry in a truck, (d) interrogated Cherry and induced him to sign a letter concerning the charge in Case 2–CA–27923, and (e) shot Cherry with a pellet gun.

The complaint further alleges that Cherry was constructively discharged by Respondents as a result of the above conduct engaged in by Respondents. It is alleged that all of the above unfair labor practices were committed because Cherry supported and assisted the Union and engaged in concerted activities.

Respondents' answer denied the material allegations of the complaint, and set forth an affirmative defense that the complaint should be dismissed, because the allegations have been determined by an arbitrator's award.[2] On April 1–3 and 25, 1996, a hearing was held before me in New York City.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Pioneer Recycling Corp. (Recycling), a domestic corporation, having an office and place of business at 527 West 29th Street, New York City, has been engaged in the provision of providing recycling services to businesses located in the New York metropolitan area. Annually, in the conduct of its business operations, Pioneer Recycling derives revenues in excess of $50,000 from business which are directly engaged in interstate commerce.

Pioneer Carting Corp. (Carting), a domestic corporation, having an office and place of business at 527 West 29 Street, New York City, has been engaged in the provision of providing garbage collection services to businesses located in the New York Metropolitan area.

Respondents admit the above facts, and further admit that they have been at all material times, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges and Respondents deny that Carting derives annual revenues in excess of $50,000 from businesses which are directly engaged in interstate commerce, and also deny that Recycling and Carting have been a single-integrated business enterprise and a single employer, and alternatively, have been joint employers of the employees involved.

The Companies

Carting and Recycling, located at the same address, are both owned by the Florio family. John Florio has an office at Carting and Recycling, and has a 50-percent ownership interest in, and is the president, supervisor, and agent of Recycling. He also has a 10-percent ownership interest in, and is the vice president, and a supervisor and agent of Carting. He administers the labor relations policies of Carting and Recycling. The labor relations policies for both companies are identical as they relate to the Union.

Stephen Florio has a 90-percent ownership interest in, and is the president, and a supervisor and agent of Carting. Stephen Florio III has a 10-percent ownership interest in Recycling, and is the secretary-treasurer, and a supervisor and agent of that company.

Carting and Recycling are located at, and share the same facility, a garage and offices at 527 West 29th Street, Manhattan. All trucks utilized by both companies are owned by Carting. One truck which is used by Recycling is leased to that company by Carting. Both companies share the same office, clerical staff, and telephone. There is an interchange between the two companies of employees represented by the Union, and an interchange of trucks.

Cherry received paychecks from both companies. He washed the trucks, and worked as a helper on trucks which were used in the garbage operation as well as the recycling business.

It was stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. The employment of Daniel Cherry

Carting and Recycling had separate, identical collective-bargaining agreements with the Union, both covering the same unit of employees. The classification of truck washer is not covered by either agreement. However, the job classification of helper is covered by the contracts.

Cherry was employed for 7 years by Respondents, having been hired in November 1987. He worked as a truck washer during the daytime—from about 8 a.m. to 4 p.m. In the evening, he worked as a helper on a garbage truck, throwing garbage and recycling materials into the truck. His evening assignments were from about 8 p.m. to 4 a.m.

Cherry's main job was washing trucks. His evening helper's work was sporadic. He worked at night only when asked by his supervisor. Sometimes he worked several weeks in a row as a helper. In other weeks, he would not work as a helper at all. He estimated, however, that in 1 year, he worked at least 6 months or more as a helper. Cherry further

[1] Respondents denied that the charges and amended charge were properly filed and served. Based on the formal papers in evidence, including postal receipts for the documents, I find that they have been properly filed and served.

[2] I reject that defense inasmuch as the arbitrator's award did not address the question of Cherry's discharge.

testified that when he worked as a helper, he was not paid the union rate.

Cherry was not a member of the Union. Beginning in the summer of 1993, while working as a helper, Cherry was approached by Robert Hunt, the Union's business agent. Cherry told him that he was replacing an employee who did not appear for work. The contract permits Respondents to replace a unit employee on notice to the Union. For a period of 1 or 2 years prior to 1993, Hunt asked Cherry to sign a card for the Union, but he refused.

Thereafter, Hunt again questioned Cherry when he saw him performing work as a helper. Cherry complained to him that he was doing the same type of work as the union-represented helpers, but not being paid at a helper's rate. In 1993, Hunt asked Cherry if he wanted to join the Union. He agreed, and signed a card for the Union. Union dues were never deducted from Cherry's pay, and he was not a union member at the time of the hearing.

Some time thereafter, John Florio approached Cherry at work and asked him why he signed for the Union, and why he "went behind [his] back." Cherry replied that he did so in order to "better" himself, and in order to obtain benefits. He said that although he was working as a helper, he received no benefits, sick days, or holidays. Florio asked him if wanted more money, adding that he did not want him in the Union. Cherry replied that he was not seeking more money. Rather, he needed benefits for himself and his five children.

Hunt testified that he asked John Florio to list Cherry as a union member, and pay union funds in his behalf. Florio refused, saying that Cherry was only a replacement for a regular employee who was absent from work that day. Florio also said that he had enough union men.

Thereafter, Cherry was asked to, and did report to the Union, where he was told by Union Attorney Michael Lieber that John Florio did not want Cherry in the Union, and that the Union would have to file for arbitration on that issue.

Later, on September 15, 1993, the Union filed a demand for arbitration, asserting that Cherry performed unit work as a helper and was not paid the contractual wage rate for that work, and that the Union did not receive fund contributions for such covered work.

Cherry testified that following the filing of the demand for arbitration, and until his arbitration hearing 1 year later on September 20, 1994, Stephen Florio approached him many times, telling him that he had a good job, and promised that he would give Cherry a pay raise every year, and benefits such as paid sick leave and paid vacation.

Cherry testified that on September 19, 1994, 1 day before the start of his arbitration hearing, John Florio told him to testify that he only worked on the garbage truck 1 day. Florio also told him to respond to Lieber's questions by "playing dumb," telling him that he did not know his name or date of birth.

On October 18, 1994, 1 month later, Cherry testified in behalf of Lawrence DiGiorgio at an arbitration proceeding brought by the Union in DiGiorgio's behalf. DiGiorgio, an employee of Recycling, and a shareholder of that company, is related by marriage to the Florios. That arbitration sought the reinstatement of DiGiorgio following his discharge.

Cherry's testimony at the October 18 arbitration consisted of confirming that DiGiorgio was present at the facility at a time when the Florios claimed he was not there. Cherry was the only employee who testified in DiGiorgio's behalf.

Cherry testified that prior to his appearance at that arbitration, John Florio asked him why he was testifying against him. Cherry replied that he was only testifying as to what he saw and what he knew. Stephen Florio, who was present at the arbitration, said that he was "upset," and asked Cherry "how could you do that to me?"

Following his testimony on October 18, Cherry worked that evening. While working, Stephen Florio III approached him and said that he would have to return to the "olden days." Cherry asked what he meant, and Florio replied that he would kill his (Cherry's) family first, and then he would kill Cherry. Cherry asked, "[W]hat about your family?" Florio replied that nothing would happen to his family.

Cherry, who is African American, responded that this is 1994, and that "blacks were killing whites, just as whites were killing blacks." Florio responded that this was just a "warning" and that something may happen before Friday.

The following day, October 19, Cherry reported the threat to Lieber, and then went to work. While at work, Cherry told Stephen Florio that Stephen Florio III threatened that he would kill him and his family. Stephen Florio replied that he was only teasing him, but that he would speak to him, and wanted Cherry to speak to Stephen Florio III, also.

That day, Cherry asked Stephen Florio III why he threatened to kill him and his family. Florio replied that Cherry could now see how he felt when Cherry testified against him and Florio's family. Cherry responded that he did not testify against his family, but rather testified only that he saw DiGiorgio at the facility on the day in question. Florio then told Cherry that DiGiorgio was suing him and the Florios for $3 million. Cherry further testified that he believed that Florio's threat was not related to the union matter, but only that he testified on behalf of DiGiorgio who was involved in litigation with the Florios.[3]

The following day, October 20, Cherry noticed that one of the garbage truck's chains was stuck in the push-out blade which moves the garbage into the body of the truck. If the blade was moved in that condition, the chain would break. He told Joe Barulich, a coworker, of this situation and they decided to fix it.

Cherry volunteered to climb into the hopper of the truck, and did so at about 2:30 p.m.[4] He attempted to free the chain by hitting it with a crowbar, kneeling or standing behind the hopper blade, while Barulich moved the blade. They worked in this manner for 1 to 1.5 hours without success, when Barulich called Florio III for help.

They again unsuccessfully worked for 1 to 2 hours to free the chain from the blade. John Florio was called and he made a suggestion which resulted in the chain becoming free. For the next 10 to 15 minutes, Barulich greased the hopper.

At that time, Cherry was still in the garbage truck, behind the hopper blade, which was closed. The hopper blade cov-

[3] The litigation apparently involved DiGiorgio's alleged servicing of customers for which he allegedly did not reimburse Respondents. The lawsuit was in the nature of a dissolution proceeding pursuant to the New York Business Corporation Law.

[4] Cherry was not precise as to the time he entered the truck, first testifying that it was about 2 to 3 p.m., and then saying that it was about 1:30 to 2 p.m.

ered the entire width of the truck. The only way Cherry could emerge from the truck was when the hopper blade was raised, permitting him to leave.

Cherry could look out of the truck through cracks in the sides of the body of the truck. He could see John Florio, Stephen Florio III, and Barulich standing next to the truck. Cherry asked Barulich twice to open the hopper blade. John Florio and Stephen Florio III stood next to Barulich when Cherry made his requests. Barulich told him to wait until they were finished greasing the truck. Cherry replied that they had already finished that task. Barulich asked for the crowbar. Cherry handed him the crowbar through a 6-inch space that the hopper was open. Cherry again asked that the hopper be opened. Barulich asked him to wait a couple of minutes. Cherry observed the three men laughing and talking.

At about 6 or 7 p.m., Mike, the night driver, arrived at work. Cherry yelled at him to let him out of the truck, saying John Florio and Stephen Florio III had him "closed up" in the truck, and he could not get out. Mike looked around but did not see Cherry. John Florio called Mike over and spoke to him, after which Mike got into a truck and left.

Another night driver, Edgar, arrived at work at about the same time. Cherry yelled at him to open the hopper. John Florio called him aside, and thereupon, Edgar got in his car and left.

During these events, John Florio, Barulich, and Stephen Florio III were standing in the area, talking to each other.

Thereafter, at about 8:30 to 9 p.m., Barulich backed the truck up a few feet, and he and the two Florios went upstairs to the office. Shortly thereafter, Edgar returned to the garage. Cherry banged on the inside of the truck with a crowbar. Edgar investigated, and opened the hopper, freeing Cherry. Cherry asked Edgar if he was told by Barulich or the Florios that he was in the hopper, and Edgar said that he was not. Cherry then went home.

Cherry estimated that he had been locked in the truck for about 2 to 3 hours. Although there was no raw garbage in the truck since it had been emptied and cleaned before this episode, nevertheless, there was water in the hopper from Cherry's washing it, and there was accumulated garbage and slime in the hopper, which was very dirty.

The following day, October 21, Cherry went to the Union and told Attorney Lieber that John Florio, Stephen Florio III, and Barulich locked him in a truck. He told Lieber that he was a good worker but he could not work if the employer was threatening his life, and that he could not take it anymore. A charge in Case 2–CA–27923, dated October 25 and signed by Lieber, was filed by the Union on October 28. The charge stated that on or about October 20, Respondents "threatened to kill, and in fact locked Daniel Cherry inside the body of a garbage truck" because of his union activities.

After visiting the Union, Cherry went to work. He confronted Barulich, and said that he called the police who would arrest him that day. Barulich denied locking Cherry in the truck, saying the Florios did. Cherry complained to Stephen Florio that he was locked in the truck by John Florio and Stephen Florio III. Stephen Florio replied that they were probably just trying to scare him. Cherry also confronted John Florio who denied locking him in the truck, and said that Barulich did it. Cherry replied that he and Florio III are the bosses, and that if they told Barulich to open the hopper he would have done so.

As set forth above, the charge in Case 2–CA–27923 was filed on October 28. It was mailed by the Regional Office on November 7, and received by Respondents on November 10.

On November 10, Cherry was asked by John Florio why he filed a complaint with the Union that John Florio was going to kill him and his family. Cherry replied that Stephen Florio III made those threats, not John. John Florio showed him the charge which set forth "John Florio" as the employer representative to contact concerning the charge. As set forth above, the charge stated that "the Employer threatened to kill Daniel Cherry." Florio told Cherry, "[M]y name is on the letter. You've got John Florio," showed him the charge, and said, "[Y]ou see, this says 'employer John Florio,' not Stephen Florio, you filed a charge against me that said I was threatening to kill you. You see, this is not Stephen Florio's name, this is my name."

John Florio then told Cherry that he wanted his name cleared. Cherry agreed, saying that John did not threaten to kill him. John Florio told Cherry that he would have his secretary type a letter which Cherry would sign. Cherry at first refused to sign a letter, but John told him that this had nothing to do with the Union's case against him, apparently referring to the grievance, and that he only wanted his name "cleared" to the effect that he had not threatened to kill Cherry, adding that his name, and not Steven's is on the charge. He told Cherry that he would prepare a letter that he had not threatened Cherry.

Shortly thereafter, John Florio presented the following typed letter to Cherry, addressed to Lieber and the Board:

> I, Daniel Cherry, did not at any time say or mention that my employer, John Florio, from Pioneer Carting and Pioneer Recycling on or before October 20, 1994 or at any time since I have been employed by John Florio, that he threatened to kill me or locked me inside the body of a garbage truck because of my union activities.
>
> This is a false statement. I have never said or implied any of the information which is contained in the charges against my employer John Florio. In fact, I have no problems with my employer, John Florio. In fact, what is stated in these papers is a total lie and fabricated by the union's lawyer, Michael S. Lieber.

Cherry testified that he looked at the letter but did not read it. He assumed that it just related to the fact that John Florio wanted his name cleared—that he did not threaten Cherry. He further stated that John Florio told him he wanted him to sign the letter because he did not make the threat. Cherry stated that he was not aware that the letter contained any information other than that John Florio did not threaten him.

Florio asked Cherry to have the letter notarized. He and Barulich searched for a notary. Since it was Veteran's Day, and banks were closed, they were unable to have it notarized in a bank. Eventually, they located a notary, and had it notarized. They returned to the shop, and Barulich took the letter to the office, and Cherry left.

Cherry testified that between October 20 and November 10, and thereafter, Stephen Florio continuously asked him to

drop the "charges" against him. Stephen Florio told Cherry that he had a job for life, would receive a raise every year, and would also receive paid vacation and sick days. Cherry replied that if the matter only involved Stephen Florio, perhaps he would drop it. However, he could not trust John Florio in the event that Stephen was no longer involved in the business.

On November 18, 1 week after he signed the letter, while working in the garage, Cherry stated that he felt a stinging sensation on the rear of his hip. He looked around, and saw John Florio, Stephen Florio III, Barulich, and Anthony, who was John Florio's cousin. They stood about 15 or 20 feet from him, inside the garage, laughing hard. He believed that he had been shot, but nevertheless continued working.

Cherry testified that 5 minutes' later, he felt the same sensation in the same area. He looked around, saw the same people, and noticed that John Florio was laughing. Cherry decided to leave. Since the four men were standing in front of the garage door, which was closed, he decided, because of fear, not to leave through the front of the garage. Cherry stated that he left from the back door, climbed a ladder to the roof of the garage, crossed the roof, and planned to descend the fire escape in front of the building, and leave from there. However, while he was on the fire escape, he saw Stephen Florio's car entering the garage. He believed that with Stephen Florio at the premises, he had nothing to fear. He returned to the roof, and then down the ladder, entered the garage, and continued to work.

Cherry stated that about 30 to 60 minutes' later, Barulich appeared in the area. Cherry told him that they were shooting at him, and he was hit in his hip. Barulich replied that someone must have thrown a rock at him. Cherry replied that no one could have thrown a rock. Shortly thereafter, Cherry went to the office. Apparently, Barulich told John Florio that Cherry claimed to have been shot by the men. John Florio asked Cherry why he said that someone was shooting at him. Cherry insisted that someone shot him. Stephen Florio told Cherry to continue working, and he would investigate the matter.

At about 5:50 p.m., Cherry finished working, and noticed Barulich and John Florio getting into Florio's van which was parked directly across the street from the garage, about 25 to 30 feet away. The garage door was open. Cherry reached to shut the light, and felt something hard hit his cheek, which became bloody. Cherry looked up and saw the two men sitting in the van, which had its doors and windows closed. The van then left the area. Cherry did not see anyone in the garage.

Cherry testified that he heard no noise when he felt the impact, but his pretrial affidavit states that he heard a loud noise. He explained this difference at hearing by stating that the object made a loud noise when it hit him.

Cherry went to the local police station and made a report. Later that evening, Cherry went to the hospital, where it was found that he suffered a small abrasion to his cheek. The report notes that Cherry complained of being shot with a pellet gun.

Cherry did not return to work thereafter. He stated that he was fearful since he had been locked in the garbage truck for a couple of hours on October 20, and then 3 weeks' later, had been shot at the garage. He believed that he would get hurt if he remained on the job.

On August 21, 1995, an arbitrator found that Cherry had performed bargaining unit work by working as a helper, 1 day per week, and possibly 2 days per week during his employment. The arbitrator concluded that Respondents were required to make contributions to the Union's funds for Cherry, and make payments of back wages to Cherry. Respondents have not complied with the award, and the Union is seeking confirmation of the award.

2. Respondents' evidence

John Florio denied being told by Cherry that he wanted to be a member of the Union, or that he wanted benefits for himself and his family. He stated that Cherry worked as a helper only about 12 or 15 times, but no more than 30 times, during Cherry's entire tenure with the companies. However, Florio conceded that at the arbitration concerning Cherry, Respondents admitted that Cherry worked as a helper more than 50 times.

Florio stated that Cherry was used only when a union employee reported that he would not be at work. At those times, Florio first called the Union and requested a "standby" worker. The Union never sent a worker pursuant to those calls, which were made at night to the Union's night or "emergency" number. Being unable to obtain a worker from the Union, Cherry was called.

Florio conceded that Hunt spoke to him about Cherry working as a helper, but denied that Hunt said that Cherry was required to become a member of the Union. Florio added that Hunt told him that DiGiorgio was giving him a lot of "pressure" regarding Cherry working as a helper.

Regarding Cherry's claim that he was locked inside the garbage truck, Florio testified that he would never do that because it was dangerous, and in any event, it was impossible to be locked inside the truck, since safety measures are utilized when working in that area, such as installing bars to prevent the blade from closing. Florio stated that Respondents' current trucks do not have chains, but conceded that the truck in which Cherry was allegedly locked in may have had chains when it was new.

Florio asserted that when a chain is broken, a mechanic is brought in who fixes it, adding that Respondents do not have the proper tools or safety equipment to hold the hopper up.

Florio denied that Cherry could have scaled the rear of the building on November 18, as he claimed.

Florio conceded that when he received the charge from the Board asserting that Cherry had been threatened and locked in a truck, he was "shocked." Florio testified that he called Cherry, and was told that this was merely Union Attorney Lieber's way of "jiggling you around" and "going against" Florio, because DiGiorgio was constantly bothering the Union. Florio stated that Cherry denied saying anything to Lieber about being locked in a truck, and said it was all a lie. It was at that point that Florio suggested a letter, and Cherry agreed to sign it. Florio stated that Cherry read it, and Florio read it to him, and asked him to have it notarized.

Cherry testified, denying Florio's assertions concerning Lieber. He noted that Lieber was a trusted adviser who had helped him with problems concerning Respondents, and he would not have told Florio that Lieber "fabricated" the allegations set forth in the charge.

Stephen Florio III testified, denying making any threat to Cherry on October 18, 1994. He stated that the day after the arbitration, he did not buy coffee for Cherry, which was his usual practice, and Cherry asked him what was wrong.

Florio III replied that he did not understand what was going on, and asked why Cherry was trying to hurt him and his family. Cherry replied that he knew that Florio would be upset. Florio continued that if someone lied, and said something about his (Cherry's) family, he would be angry too. Cherry responded with a statement regarding "blacks killing whites these days," and walked away.

John Florio and Stephen Florio III denied shooting Cherry.

Respondents note that neither the Union nor Cherry was serious about him becoming a member of the Union. Thus, notwithstanding Hunt's 2 years of complaints to the Florios that Cherry must be in the Union, nothing formal was done about it until the grievance which was filed in September 1993.

Respondents argue that in order to find a violation, I must find that the alleged activities engaged in by Respondents, the promises of benefits, the threat, being locked in the truck, the interrogation, and the constructive discharge, were all motivated by an intent to discourage union membership or activity. They contend that if I cannot find an antiunion motivation in their allegedly unlawful conduct, I must dismiss the complaint.

Respondents assert, on brief, that the only possible reason I can find for such activity is Cherry's "willingness to assist the DiGiorgios in their litigation against the Florios," as testified essentially by Stephen Florio III. According to Respondents, they were permitted to take the actions they did for such a reason. Respondents conclude that inasmuch as their conduct, if it occurred, was not done for antiunion reasons, they have not violated the Act.

B. *Analysis and Discussion*

1. Credibility determinations

In reaching my findings herein concerning conversations which occurred between Cherry and the Florios, I credit Cherry. Overall, Cherry impressed me as someone who was sincere and truthful. He lacked the sophistication and polish to have fabricated the various incidents he testified to.

Cherry's detailed, straightforward, unembellished, and candid recitation of the frightening episodes he was subjected to, which clearly made an indelible impression upon him, could not have been made up.

Moreover, as will be explained below, Cherry's version of the incidents is supported by certain testimony of Hunt and Stephen Florio III. Accordingly, where Cherry's version of the events differs from that of the Florios, I credit Cherry.

2. Single employer

As set forth above, Recycling and Carting, located at the same address, and which share an office, clerical staff, telephone, garage, trucks, and employees are both owned by the Florio family. John Florio has an ownership interest in, and is an officer of both companies, for which he administers the labor relations policies, which are identical. Both companies perform services in the garbage removal industry. Carting specifically is involved in picking up and disposing of garbage, whereas Recycling picks up and disposes of recyclable materials. Different trucks are used by each company, but on occasion trucks are shared. Cherry received paychecks from both companies, and was supervised by officials of both.

The Board applies four criteria in determining whether separate entities constitute a single employer. Those criteria are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one of the four criteria is controlling, nor need all be present to warrant a single-employer finding. "Single employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'" *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991).

It is quite apparent that Respondents have interrelated operations. Although both are nominally separate in that Carting removes garbage waste and Recycling removes recyclable waste, their business purpose is the same—both are engaged in the waste pickup and disposal business. They share trucks when necessary to complete the tasks. They share the same place of business, office, telephone, garage, trucks, and employees.

Respondents also have common management. John Florio is an officer of Carting and Recycling. The management of Respondents consist of members of the same family who supervise the employees of both companies. Centralized control of labor relations is established in that John Florio handles the identical labor relations of both companies.

Ownership of the two companies is enjoyed by members of the Florio family, with John owning 50 percent of Recycling, and 10 percent of Carting, and Stephen owning a 90-percent interest in Carting, and Stephen Florio III owning 10 percent of Recycling. Businesses that, at least nominally, are owned by different individuals may constitute a single employer. *Mr. Clean of Nevada*, 288 NLRB 895 (1988).

Based on the above, I find an absence of the arm's-length relationship found among unintegrated companies.

I accordingly find and conclude that Carting and Recycling are a single employer.

3. Promise of benefits

The complaint alleges that in the fall of 1994, Stephen Florio made promises of benefits to Cherry if he refused to pursue, and failed to testify in support of his grievance.

Cherry credibly testified that following the Union's demand for arbitration in his behalf, in September 1993, and until the start of his arbitration hearing on September 20, 1994, Stephen Florio promised him many times that he would give him a pay raise every year and benefits including paid sick leave and vacation. Cherry also credibly testified that from October 20 to November 10, Stephen Florio continuously asked him to drop the charges against him, telling Cherry that he had a job for life, would receive a raise every year, and paid vacations and sick days. This clearly has reference to the grievance, since the unfair labor practice charge was received by Respondents on November 10.

These remarks were all made during the pendency of the arbitration matter. A decision in Cherry's case was rendered in August 1995.

It is clear that Respondents sought to cause Cherry to drop the arbitration case. This is firmly demonstrated in John Florio's request to Cherry, one day before the arbitration hearing commenced, that Cherry "play dumb" by testifying

that he did not know his name or date of birth, and that he had only worked as a helper on the garbage truck 1 day.[5]

I accordingly find and conclude that Stephen Florio made promises of benefits to Cherry in order to induce him to withdraw his grievance. Such conduct constitutes an unlawful effort to have Cherry refrain from engaging in concerted activity—the right to file a grievance and have it considered—in exchange for certain benefits. *Virginian Metal Products*, 306 NLRB 257, 266 (1992); and *Pere Marquette Park Lodge*, 237 NLRB 855, 858 (1978).

4. Threat of bodily harm

The complaint alleges that on October 18, 1994, Stephen Florio III threatened Cherry with bodily harm if he pursued his own grievance, and because he testified on behalf of DiGiorgio on that date.

I find, based on Cherry's credible testimony, that on October 18, only a few hours after Cherry testified in behalf of DiGiorgio at the union arbitration brought in behalf of DiGiorgio, that Stephen Florio III threatened to kill him and his family.

Such a finding is supported by Cherry's testimony that he heard the threat directly from Stephen Florio III, and also by Cherry's other testimony that Stephen Florio explained that Stephen Florio III was only teasing him, and that he would speak to Florio III. Further, when confronted by Cherry the next day, Florio III explained that now Cherry could see how Florio felt when Cherry testified against him and his family.

Stephen Florio III testified, denying threatening Cherry, but conceding having told Cherry that he was trying to hurt Florio and his family. I cannot credit Florio III's testimony that Cherry threatened him without provocation. Thus, Florio III stated that after he suggested to Cherry that he would be angry if someone lied about his family, Cherry responded that blacks are killing whites now. Cherry's alleged statement does not make logical sense. There would be no reason for Cherry to make that remark given Florio III's statement. Further, Cherry's admitted remark to Florio that blacks are killing whites came as a response to Florio's threat.

Rather, the version recited by Cherry makes more sense. He stated that he felt intimidated by Florio III's threat to him, and in an attempt to defend himself, he made a similar comment to Florio III.

That Respondents bore animus for Cherry's testimony in behalf of DiGiorgio is clear. According to Cherry's credited testimony, he was told by John Florio that Cherry's testimony was "against" him, and Stephen Florio asked, "[H]ow could you do that to me?"

Section 7 of the Act provides that "employees shall have the right to self-organization, to form, join, or *assist* labor organizations." (Emphasis added.)

The Board has long held that "participation as a witness in an arbitration is an activity protected by Section 7 of the Act." *Barnard Engineering Co.*, 295 NLRB 226, 251 (1989); and *White Oak Coal Co.*, 295 NLRB 567, 569 (1989). "Arbitration must be shielded against measures which would tend to discourage any individual from appearing and testifying fully and truthfully." *Oil Workers Local 4-23 (Gulf Oil)*, 274 NLRB 475, 476 (1985).

Employees need not be members of a union or in the collective-bargaining unit in order to be protected by Section 7 of the Act. Cherry's lack of union membership did not foreclose his right to protection when his activities were in aid of the Union. *Heritage Manor Center*, 269 NLRB 408, 414 (1984); see *NLRB v. Faulkner Hospital*, 691 F.2d 51, 54 (1st Cir. 1982).

The evidence is clear that Cherry was threatened because he assisted the Union in its prosecution of a grievance by its member DiGiorgio. Such activity violates Section 8(a)(1) of the Act. Thus, the Florios exhibited resentment toward him for his activity in behalf of the Union in aid of DiGiorgio.

Respondents argue that, assuming it is found that they threatened Cherry because of his testifying in behalf of DiGiorgio, no violation of the Act has been committed because their animus toward Cherry, was directed at his support for DiGiorgio, their relative by marriage with whom they were involved in bitter litigation concerning the business itself.[6]

Regardless of the reason for their anger at Cherry, Respondents' conduct toward him was clearly motivated because he assisted the Union in testifying at DiGiorgio's arbitration. Threatening or discriminatory conduct toward Cherry because he engaged in his Section 7 right to assist the Union violates the Act.

Respondents argue that Cherry's testimony that his conversation with Florio III was just "mouth talking" establishes that Florio's remarks were not considered as a threat by Cherry. I do not agree. First, an objective test is used in determining whether a statement is a threat. The standard is whether the statement tended to restrain and coerce Cherry, not Cherry's subjective feelings about it. Second, Cherry testified in answer to a question as to whether there was physical contact between him and Florio. In response, he said that they were "just mouth talking," in other words, they were conversing and not fighting. Moreover, Cherry's immediate report of the threat to Lieber the next day, and Lieber's inclusion of the threat in the charge filed with the Board show that Florio's threat was taken seriously.

5. Locking Cherry in the truck

The evidence establishes that on October 20, Respondents locked Cherry in the garbage truck. As set forth above, Cherry entered the truck through the hopper in order to free a chain. After successfully accomplishing that task, Cherry asked to be released from the truck, but Respondents' officials, John Florio and Stephen Florio III, ignored his pleas. They also refused to permit other employees, Mike and Edgar, to release him. Stephen Florio's admission to Cherry that the men were just trying to scare him also lends credence to Cherry's version.

Cherry credibly testified that he was locked in the truck for 2 to 3 hours. His detailed, precise testimony proved that Respondents deliberately left him in the truck from which he

[5] The General Counsel requests that I find that Respondents encouraged Cherry to testify falsely at his arbitration. Although it appears that Stephen Florio asked Cherry to falsely testify that he worked only 1 day on the truck, and not give true answers, since this allegation was not made a part of the complaint, I find that Respondents were not given proper notice that a finding was sought as to such issue. I accordingly reject the General Counsel's request.

[6] I note that Cherry gave a deposition to DiGiorgio's attorney with respect to the civil litigation.

could not leave without their intervention. I find that this conduct, coming only 2 days after the threat to kill him and his family, was clearly related to his testimony at the arbitration. This was an undisguised attempt to further intimidate Cherry, and punish him for his arbitral testimony. *White Oak Coal Co.*, supra; and *Osage Mfg. Co.*, 173 NLRB 458, 462 (1968).

I accordingly find and conclude by locking Cherry in the garbage truck, and refusing to release him, Respondents violated Section 8(a)(1) of the Act.

6. Interrogation and inducement of Cherry to Sign a letter repudiating the charge

Cherry's credited testimony establishes that on November 10, the date that Respondents received the charge, John Florio asked him why he complained to the Union, and then convinced him that the charge falsely stated that John Florio was named as the person who had threatened Cherry. In furtherance of this misrepresentation, Florio had a letter prepared in which Cherry repudiated all the allegations of the charge, and stated that the Union's attorney had fabricated them.

I credit Cherry's testimony that he did not read the letter. It is highly doubtful that Cherry would have signed an accusation that Union Attorney Lieber falsified the charge involving his being locked in the truck, especially after Cherry complained to Lieber about the incident, and Lieber filed a charge in his behalf. Florio's haste in asking Cherry to have the letter notarized and returned to him that day lends support to a finding that Florio sought to take advantage of Cherry's limited ability with the English language. Moreover, Florio's erroneous statement to Cherry that the charge named him (John Florio) as having threatened Cherry, was a deliberate attempt to manipulate Cherry into believing that the charge was false. This confusion gave Florio the opportunity to prepare a letter in which Cherry, without his agreement, repudiated the entire charge.

John Florio's actions, set forth above, constitute unlawful interrogations of Cherry, and by suggesting to Cherry that the charge involved deceit, the reasonable tendency thereof is to restrain employees from initiating or assisting in the investigation of a charge, in violation of Section 8(a)(1) of the Act. *Debber Electric*, 313 NLRB 1094, 1100 (1994); and *Washington Beef Producers*, 264 NLRB 1163, 1169–1170 (1982).

7. The shooting of Cherry

The evidence establishes that on November 18, Cherry was shot with what appears to be a pellet gun. Thus, on three separate occasions in the garage that day, Cherry felt a stinging sensation to his body, and on the last occasion, blood was drawn from his face. That these events occurred cannot be questioned. Cherry testified convincingly concerning the shootings, describing with great detail what occurred. In addition, on the day of the incidents, Cherry reported them to the police, and a hospital record was made.

The difficulty is assessing responsibility. The General Counsel argues that a finding must be made that Respondents shot Cherry because only the Florios, Barulich, and a relative of John Florio, were present at the time of the incidents. However, Cherry did not see the shooter, did not see any of the persons present holding a weapon, and no admissions were made to him concerning the episodes. In addition, John Florio and Stephen Florio III denied shooting him.

The standard of proof in this case is not the same as that in a criminal case. Here, only a preponderance of the evidence is required to find that a violation has occurred—not the heavier, criminal burden that guilt be proven beyond a reasonable doubt.

Under these circumstances, particularly that (a) the garage area is in an enclosed space, and that during one of the shootings, the garage door was nearly fully closed, (b) the only persons present were Respondents' officials, or a relative of them, (c) there was no evidence that any person from outside the facility could have engaged in this conduct, and if they had, that they would have shot Cherry three separate times, (d) Cherry's credible testimony was that immediately after the first two shootings, Respondents' officials laughed, and (e) Cherry reasonably believed that Respondents had shot him, a finding is compelled, which I make, that Respondents were responsible for the shooting of Cherry.

I find that Respondents engaged in this activity in furtherance of their pattern of conduct toward Cherry in retaliation toward him for testifying in behalf of the Union at the DiGiorgio grievance, and for his filing the charge against them. Violence committed against employees for reasons of their engaging in activities protected by Section 7 of the Act, interfered with, restrained, and coerced Cherry in the exercise of those rights and violates Section 8(a)(1) of the Act. *Staten Island Bus Co.*, 312 NLRB 416 (1993).

8. The constructive discharge

The Board applies the test set forth in *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976), to determine whether a constructive discharge has taken place:

> [t]here are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

I first find that Cherry was forced to resign because of the extraordinarily severe burdens placed on him by Respondents. Those incidents, all of which constitute unfair labor practices, which I have found, were of such an extreme nature that I must find that they caused, and were intended to cause him to quit his employment.

Specifically, the following instances all made Cherry's continued working for Respondents virtually impossible: (a) Stephen Florio III's threat to kill Cherry and his family, (b) Respondents' refusal to release Cherry from the garbage truck, and (c) Respondents' shooting Cherry with a pellet gun.

It is true, as argued by Respondents, that Cherry continued to work following the threat, the garbage truck incident, and the first two shootings on November 18. He did so, however, not because he believed that these incidents were trivial, but because, as he testified, he had to do so in order to support his family. He did, however, quit following the third shoot-

ing incident that day, because he believed that he would get hurt if he remained on the job.

Taken together, or separately, Respondents' actions caused a change in Cherry's working conditions which were so difficult or unpleasant as to force him to resign. *Davis Electric Wallingford Corp.*, 318 NLRB 375, 377 (1995). The incidents outlined above clearly created intolerable working conditions, causing Cherry to quit.

It is also clear that Respondents imposed these burdens on Cherry because of his protected activities. Respondents harbored great animus toward Cherry, for his testimony at the arbitration of DiGiorgio, and his own arbitration, and because he filed a charge with the Board. Promises of benefits were made to him in order to have him withdraw his grievance, and the threat was made because of his arbitral testimony. Further, Respondents sought to improperly induce him to disclaim the charge filed by the Union.

The incidents outlined above, all occurred immediately, or shortly after Cherry testified at the arbitrations. Cherry's arbitration hearing occurred on September 20, prior to which he was promised benefits. He testified at DiGiorgio's arbitration 1 month later, on October 18. Cherry was threatened on October 19, and locked in the truck the next day, October 20. On November 10, 20 days' later, he was improperly influenced to repudiate the Union's charge. Only 8 days' later, Cherry was shot three separate times in the garage.

Ample evidence exists of Respondents' animus toward Cherry because of his activities in behalf of the Union, and that Respondents' actions set forth above, were undertaken because of such activities engaged in by Cherry.

I, therefore, find and conclude that Cherry did not quit on November 18, but rather was constructively discharged in violation of Section 8(a)(1) of the Act.[7]

I find that the General Counsel has met her burden of proving that Cherry's protected activity was a substantial or motivating factor in Respondents' imposing the intolerable changes in his working conditions. *Wright Line*, 251 NLRB 1083 (1980).

Inasmuch as Respondents have denied that these changes in Cherry's working conditions occurred, or that it was responsible for them, and I have rejected Respondents' arguments in this regard, I find that Respondents have not met their burden of proving that these changes would have taken place even in the absence of Cherry's protected activities. *Wright Line*, supra; *Manno Electric*, 321 NLRB 278 (1996).

CONCLUSIONS OF LAW

1. Respondents are a single-integrated business enterprise and a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By making promises of benefits to an employee if he withdrew his grievance, Respondents violated Section 8(a)(1) of the Act.

4. By threatening an employee with bodily harm because he assisted the Union, Respondents violated Section 8(a)(1) of the Act.

5. By locking an employees in a garbage truck, and refusing to release him, Respondents violated Section 8(a)(1) of the Act.

6. By interrogating an employee, and inducing him to sign a letter repudiating a charge filed in his behalf, Respondents violated Section 8(a)(1) of the Act.

7. By shooting an employee with a pellet gun, Respondents violated Section 8(a)(1) of the Act.

8. By discharging Daniel Cherry on November 18, 1994, Respondents violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily discharged an employee, they must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondents, Pioneer Recycling Corp. and Pioneer Carting Corp., New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 813, International Brotherhood of Teamsters, AFL–CIO or any other union.

(b) Making promises of benefits to employees if they withdraw their grievance.

(c) Threatening employees with bodily harm because they assisted the Union.

(d) Locking employees in a garbage truck, and refusing to release them because of their protected activities.

(e) Coercively interrogating employees about their union activities, and inducing them to sign a letter repudiating charges filed in their behalf.

(f) Shooting employees with a pellet gun because of their protected activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[7] The complaint alleges that Cherry was constructively discharged in violation of Sec. 8(a)(4) of the Act. Although Respondents sought to induce Cherry to repudiate the charge which had been filed by the Union on his behalf, I cannot find that such conduct, although an independent violation of Sec. 8(a)(1), was one of the incidents which caused his constructive discharge.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Daniel Cherry full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Daniel Cherry whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge and notify Daniel Cherry in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facility in New York, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 28, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."